

RASID KULOP MOHAMAD

a

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR

b

ABDUL KADIR MUSA J

[CRIMINAL APPLICATION NO: 44-69-2003]

17 SEPTEMBER 2004

PREVENTIVE DETENTION: *Habeas corpus - Application for - Authorization for continued detention of detainee not properly addressed - Whether constituted a failure of a procedurally substantive requirement - Whether detention unlawful - Whether habeas corpus ought to be granted*

c

The applicant was detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). He applied for a writ of *habeas corpus*. From the evidence it appeared that the authorization for continued detention by the police officers was not addressed to the detaining/receiving authority. The question was whether this constituted a breach of a 'procedurally substantive' requirement thereby rendering the continued detention of the applicant unlawful.

d

e

Held (allowing the application):

[1] Defects in complying with certain procedural requirements will not render the detention under s. 4 of the Ordinance unlawful so long as it does not result in gross injustice to the detainee. (p 724 a)

f

[2] In the instant case, the relevant authorization documents were not addressed to the appropriate detaining/receiving authority. This failure was a failure to comply with a 'procedurally substantive' requirement, rendering the detention unlawful. (pp 727 g & 728 a)

g

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3)(a), (b), (5), 4(1)

Federal Constitution, art. 5(1)

For the applicant - Abd Shukor Ahmad (Baljit Singh Sidhu); M/s Shukor Baljit & Partners

h

Reported by Andrew Christopher Simon

i

a

JUDGMENT

Abdul Kadir Musa J:

b The applicant, Rasid bin Kulop Mohamad, represented by his counsel, Encik Shukor Ahmad and Encik Baljit Singh applied to this court for a writ of *habeas corpus* vide encl. (3) supported by his affidavit as per encl. (2). The respondent was represented by Encik Najib Zakaria. The detention was made under s. 4(1) Emergency (Public Order And Prevention of Crime) Ordinance 1969 (“the Act”) by the Deputy Minister of Home Affairs on 30 May 2002 for a period of two years effective from the same date. Detained under the same section is *Murali a/l Munusamy* in 44-48-2003 whereby counsels for the applicant and respondents were the same as in 44-69-2003. That being so, both parties agreed that, the decision in 44-69-2003 will also be equally applicable to 44-48-2003.

Section 4(1) of the Act provides as follows:

d

- (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, ... the Minister shall make an order ... directing that person to be detained for any period not exceeding two years.

e

In the present application before me, the question of “... the Minister (being) satisfied ...” that the relevant detention order “... is necessary ...” within the purport of the said s. 4(1) is not the issue at the preliminary stage of the detention. What is more compelling for me to consider is whether or not the detentions under sub-ss. 3(3)(a) and (b) of the Act have complied with the essential requirements of those sections. I said so because the aforesaid detention order was, from the facts of the application before me, certainly made consequential to the detention under the said s. 3(3)(a) & (b).

f

For convenience, the said sub-section (3) of the Act states:

g

- (3) Any person arrested and detained under this section may be detained in police custody for a period **not** exceeding sixty days **without an order of detention** having been made in respect of him **under section 4(1)** (of the Act):

Provided that:

h

- (a) he **shall not** be detained for more than twenty-four hours **except** with the authority of a police officer of or above the rank of an Inspector;

i

(b) he **shall not be detained** for more than forty-eight hours **except** with the authority of a police officer of or above the rank of an Assistant Superintendent; *a*

(c) he **shall not** be detained for more than thirty days **unless** a police officer of or above the rank of a Deputy Superintendent **has reported** the circumstances of the arrest and detention **to** the Inspector-General of Police ... **and** the Inspector-General ..., **shall forthwith report the same to the Minister.** (emphasis added). *b*

If all the requirements of the said s. 3(3) have been complied with, then the arrest and detention by the appropriate police officers concerned has to be lawful by virtue under s. 3(5) of the Act, s. 3(5) provides: *c*

(5) Any person detained under the powers conferred by this section shall be deemed to be **in** lawful custody, and may be detained **in** any prison, or **in** any police station, or in any other similar place authorised generally or specially by the Minister. (emphasis added). *d*

From the above, it is my firm conclusions that s. 3(3)(a)-(c) of the Act speak of:

- (1) the “Procedural Compliance” by the arresting and authority detaining authority; and *e*
- (2) the “Constitutional Right” of individual under art. 5 of the Federal Constitution.

It is only when (1) above is religiously complied with can an individual “Constitutional Right” be deprived by virtue of art. 5(1) of the Federal Constitution. The law that legalised such deprivation is s. 3(5) of the Act. Having established that, it is now incumbent on me to be satisfied beyond reasonable doubt that (1) above has been adhered to. Failure to do so, leaves me with no alternative, but to allow the application without having to consider “the satisfaction” of the Minister in issuing the relevant detention order under s. 4(1) Of the Act. For that purpose, s. 3(3) of the Act requires further analysis. *f*

Dissection of the aforesaid section 3(3) irresistibly led me to two main conclusions which I would classified as:

- (a) “Procedurally procedure”; and *h*
- (b) “Procedurally substantive”.

i

- a* In (a) above, it includes “technicalities”. In that respect, I strongly hold that, defect in complying with certain procedural requirement so long as it does not result to gross injustice to the person detained would not result in the detention under s. 4(1) to be unlawful. As an example, if the form used has not yet been gazetted, the use of such a form, should not invalidate the order made by the Minister. Another example is a genuine typing error as to the “date” or “month” in which the relevant order is being relied upon. Such an error should not invalidate the detention order as being unlawful for want of procedural compliance so long as it can be supported by other documents to show otherwise. Since “procedurally procedure” defects is non-exhaustive, it will be sufficiency for me to cite those two examples, and to elaborate further on (b) above.
- b*
- c*

Unlike (a) above, any non-compliance of “procedurally substantive” procedures goes to the very core of infringement of the “constitutional right” of individual entrenched in art. 5 of the Federal Constitution. In that context, s. 3(3) must be read together with s. 3(5) of the Act.

- d*
- Microscopic analysis of both the aforesaid sub-sections of s. 3 of the Act dictates me to search the legal significance of the word “in” in both ss. 3(3) and 3(5) of the Act. In s. 3(3), it speaks of “... detained in police custody ...”, whilst in s. 3(5) it clearly states as “... deemed to be in lawful custody, ...” which can be done so “... in any prison, or in any police station, or in any other similar place authorised ... by the Minister.” Thus the use of the word “in” suggests, without doubt, that, the “detained person” must be detained in any of the places specified by s. 3(5) of the Act. Such custody, by virtue of s. 3(3), is “in police custody”, which s. 3(5) deems it “... to be in lawful custody ...”. Nowhere in both ss. 3(3) and 3(5) speak of being “in” the “lawful custody” of any of the “police officers” referred to in s. 3(3)(a)-(c) of the Act. The said s. 3(3)(a)-(c) identifies “which” of the police officers “can do what” in order to make the arrest and detention lawful.
- e*
- f*

- g* “Can do what”, in my opinion, will certainly fall within the intention of “Procedurally substantive” matter(s) referred to me earlier. In the context of my above analysis, in order to satisfy the word “in” found in s. 3(5) discussed above it follows that, any of the officers exercising his power under s. 3(3)(a) or (b) of the Act must direct appropriate prison officer(s) or police officer(s) of any police station or officer(s) of other similar places authorised by the Minister “to receive and detain” the detained person “in any prison” or “in any police station” or “in any other similar place ...” but certainly not to
- h*

i

himself. To comply with the above requirement, there must be conclusive
evident that the officers exercising their powers under s. 3(3)(a) and (b)
aforesaid communicate to any officers of “any prison” or “any police station”
or “any other similar place (of lawful detention)” which can be extracted from
all the relevant facts of the application. Unfortunately I could not find any.

Close scrutiny of those relevant facts, there is not a shred of evident to suggest
that there was any oral communication of the aforesaid nature from either chief
Inspector A.Rahman b. Hj. Hamid or ASP Mansor b. Mohamad. Documentary
evident of the exercise of a valid power by the former is evidenced by exh.
“ARAH 2” of encl. (12) whilst that of ASP Mansor is exhibited by “MMI”
to encl. (11). Both the said officers rightly exercised their powers under
s. 3(3) (a) and s. 3(3)(b) of the Act respectively.

However close reading of both the said “ARAH 2” and “MMI” shows clearly
that, neither the said documents speaks of “to whom” both the said documents
were addressed to. They merely speak of the respective officers exercising their
respective power and explained why the detained person, Rasid bin Kulop
Mohamad, needed to be detained further under s. 3(3)(a) and later s. 3(3)(b)
of the Act. It is my considered conclusion that both “ARAH 2” and “MMI”
should be addressed to the “detaining authority”, otherwise such documents
are not authorisation documents. I find support to my said conclusion in
“WAN-1” to encl. (10) of Superintendent Wan Ahmad Najmuddin bin Mohd.

In the said “WAN-1” of encl. (10), Superintendent Wan Ahmad was acting
under s. 3(3)(c) of the Act whereby he is required to report “the circumstances
of the arrest and detention” of Rasid bin Kulop Mohamad “to the Inspector-
General of Police or to a police officer designated by the Inspector-General
in that behalf ...”. From “WAN-1”, it is clearly addressed to “ACP Abd. Rahim
b. Hj. Hanafi, KPP D7, of Jabatan Siasatan Jenayah, PDRM, Bukit Aman,
Kuala Lumpur. ACP Abd. Rahim b. Hj. Hanafi, was the “police officer
designated by the Inspector-General of Police” to receive such report as stated
in para. (3) of encl. (10) as supported by “ARAH-1” to encl. (9).

Section 3(3)(c) placed the burden of reporting the aforesaid arrest and detention
to the Minister on the aforesaid “designated officer”. This was done by him
as evidenced by “ARAH-2” to the same enclosure. Again the said “ARAH-
2” is properly addressed to:

Y.B Menteri Dalam Negeri Kementerian Dalam Negeri

a From the above, it is demonstrated that, what is required of “procedural substantive” actions to be taken has been taken by appropriate officer(s) by addressing “to”:

(i) ASP Abd. Rahim bin Hj. Nahafi aforesaid by Supt. Wan Ahmad Najmuddin bin Mohd; and

b

(ii) Y.B Menteri Dalam Negeri, Kementerian Dalam Negeri, by the aforesaid ACP Abd. Rahim,

c

Under s. 3(3)(c) of the Act. Even the “Detention Order” made by the Minister under s. 4(1) of the Act as per “ZAZ-1” to encl. (6) of the Deputy Minister of Home Affairs was addressed to as follows:

Kepada:

d

Penguasa
Pusat Pemulihan Akhlak,
Simpang Rengam,
Johor.

e

Ketua Polis Negara,
Bukit Aman,
50560 Kuala Lumpur.

f

The presence of the word “Kepada” in “ZAZ-I”, “to ACP Abd.Rahim b. Hj. Hanafi” in “WAN-I” to encl. (10), and “to Y.B Menteri Dalam Negeri ...” in “ARAH-2” to encl. (9) enhanced my conclusion that the respective relevant documents must be addressed “to” appropriate officer(s) who is or are entrusted to take “in custody” the applicant in this application; thus satisfies one of the “procedural substantive” requirements for the valid exercise of a preventive detention as required by law. This is absent in the case of:

g

(1) “ARAH-2” to encl. (12) (the affidavit of the Chief Inspector Abdul Rahman b. Hj. Abdul Hamid under s. 3(3)(a) of the Act); and

h

(2) “MM-I” to encl. (11) (the affidavit of DSP Mansor b. Mohamed).

i

Both “ARAH-2” and “MM-1” were not addressed to anyone at all. Without it, the question is, “to whose custody should the applicant, Rashid bin Kulop Mohamad be placed?”. Both the said documents only speak of the need to detain further for a period of more than (i) 24 hours (s. 3(3)(a) of the Act in respect of “ARAH-2”) and (ii) 48 hours (s. 3(3)(b), *ibid*, in respect of “MM-I”). If those two documents which speak clearly of the respective officers’ right to detain the applicant as stated earlier are placed alongside with “ZAZ-I” to encl. (6), a glaring similarity as to the form can be seen as illustrated below except that, “ZAZ-I”, as pointed out above, is properly addressed “to” the appropriate “detaining authority” “whose custody of the applicant was being properly placed” but not in the respect of “ARAH-2” and “MM-I” aforesaid.

In both “ARAH-2” and “MM-I” aforesaid, the following words can be found:

BAHAWA saya C/Insp. A. Rahman bin Hj. A. Hamid ... **Berpuashati** berkenaan kes terhadap [the Applicant] ... dengan menjalankan kuasa-kuasa yang diberi kepada saya di bawah Seksyen 3(3)(a) (of the Act), maka saya dengan ini **memberi kuasa** supaya [the Applicant] dilanjutkan **tahanannya** selama 24 jam lagi ... (emphasis added).

in respect of “ARAH-2”, and “C/Insp. A. Rahman ...” and “s. 3(3)(a)” were being substituted with “[ASP] MANSOR BIN MOHAMAD” and “s. 3(3)(b) ...” respectively in “MM-I”. The effect to that is to legalise the respective relevant detentions under the aforesaid sections. Words having similar effect of legalising detention under s. 4(1) of the Act as for “ZAZ-1” are as follows:

BAHAWASANYA saya [DATO’ ZAINAL ABIDIN BIN ZIN, TIMBALAN MENTERI DALAM NEGERI, MALAYSIA] **berpuashati** yang Perintah ini adalah perlu dibuat ke atas [‘the Applicant’]

Oleh yang demikian, pada **menjalankan kuasa yang diberi kepada saya** di bawah Seksyen 4(1) [‘of the Act’], maka saya **mengarahkan** dengan Perintah ini **supaya [‘the Applicant’] ditahan selama** dua tahun ... (emphasis added).

The word “mengarahkan” is, without doubt, authorised the person(s) addressed “to” thereto, to receive the applicant “in his or their custody” under s. 4(1) of the Act similar to “authorising” the person(s) to do the same within the permitted periods as provided by ss. 3(3)(a) and (b) of the Act. The glaring difference is that, as pointed above and at the risk of repetition, in respect of “ZAZ-I” it was properly addressed to the “receiving authority” but not in either “ARAH-2” or “MM-I”. Failure to do so is what I have termed as a “failure

a to comply with one of the “procedurally substantive” requirements”. Such a “substantive” failure, compelled me to conclude that the detentions under s. 3(3)(a) and (b) of the Act as unlawful. Consequential to that, it has the effect of vitiating the legality of a proper exercise of power by the Minister under s. 4(1) of the Act.

b On the premises above, and for the reasons elaborated above, I am left with no alternative but to issue the writ of *habeas corpus* as applied for accordingly; and so ordered.

c

d

e

f

g

h

i